FILE COPY

FILED
MAY 1 1948

SUPREME COURT OF THE UNITED STATES

11 Missing when received

OCTOBER TERM, 1947

No. 777

LAND O' LAKES DAIRY COMPANY,
Petitioner,

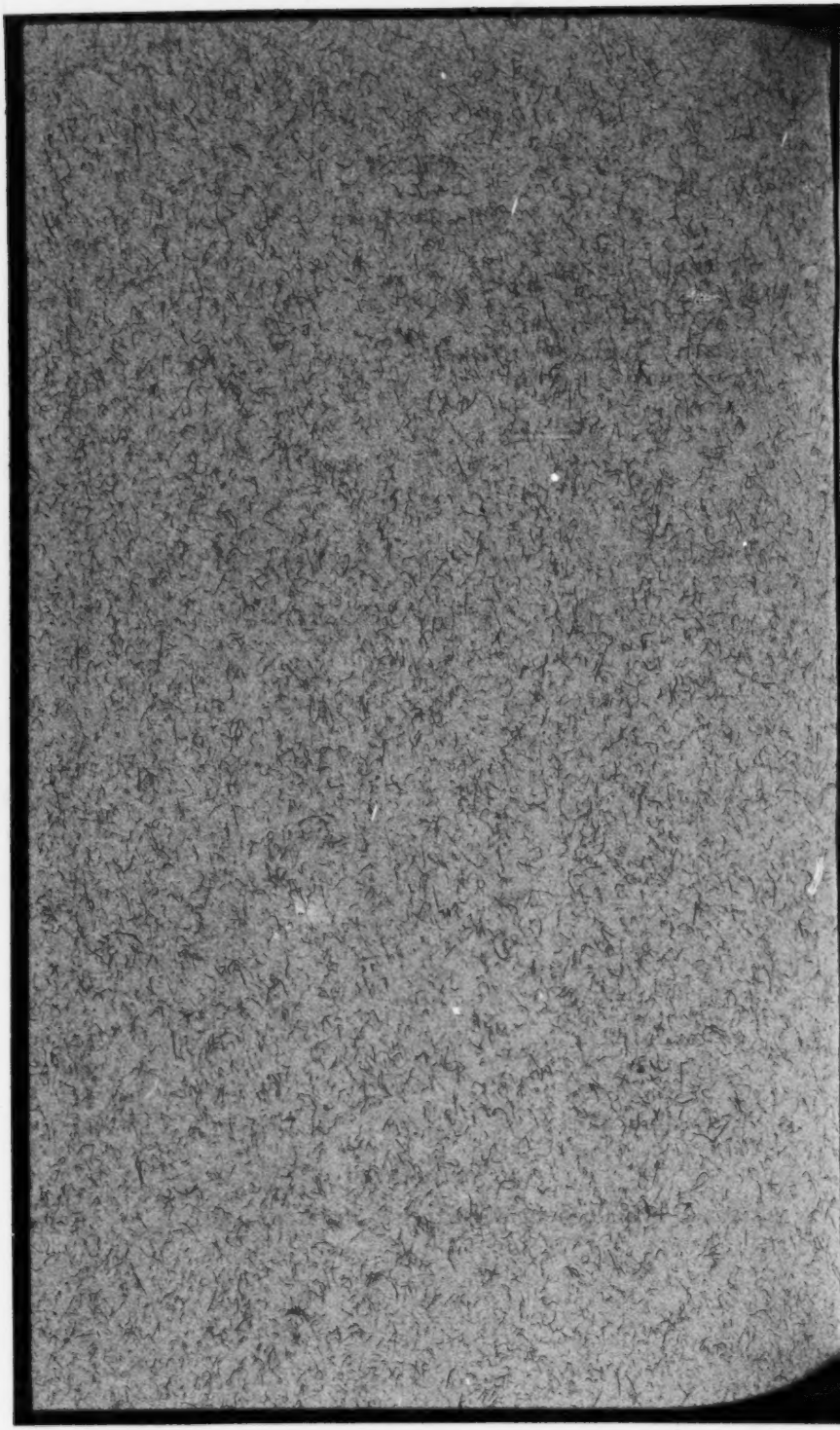
vs.

VILLAGE OF SEBEKA, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND SUPPORTING BRIEF.

M. J. Doherty,
Harold Jordan,
Saint Paul, Minnesota,
Attorneys for Petitioner.

Doherty, Rumble, Butler & Mitchell,
Saint Paul, Minnesota,
Of Counsel.



INDEX

Subject Index

	Page
Summary statement	1
Question presented	3
Basis of jurisdiction	4
Reason for allowance of writ	5
Assignments of error	10
Argument	10

Table of Cases

Deuel v. *Hawke*, 2 Minn. 50, Gil. 35	7
Mayo v. *U. S.*, 319 U. S. 441	13
Mullen Benevolent Corporation v. *U. S.*, 290 U. S. 89	12
Nashville, Chattanooga & St. Louis Ry. Co. v. *Wallace*, 288 U. S. 249	5
Oklahoma v. *Barnsdall Corporation*, 296 U. S. 521	13
Richfield Oil Corporation v. *State Board*, 329 U. S. 69	7
S.R.A., Inc. v. *Minnesota*, 327 U. S. 558	5
U. S. v. *Allegheny County*, 322 U. S. 174	5

Statutes Cited

Judicial Code, Sec. 237(b), 28 U.S.C.A., Sec. 344	4
Lend-Lease Act, 22 U.S.C.A. 411-419	2
Appropriation Act of Congress (55 U. S. Stat. 53-55)	2
Minnesota Statutes, 1945:	
Section 272.50	11
Section 277.02	11
Section 277.03	11
Section 277.10	11

Texts Cited

Dunnell's Minnesota Digest, Sec. 7559	7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 777

LAND O' LAKES DAIRY COMPANY,
Petitioner,

vs.

VILLAGE OF SEBEKA, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Land O' Lakes Dairy Company, hereby petitions for review, upon writ of certiorari, the decision and judgment of the Supreme Court of Minnesota, being the Court of last resort of that State, and respectfully shows:

Summary Statement of the Matter Involved

This is an action for Declaratory Judgment brought by the Dairy Company against the taxing authorities of Minnesota praying for judgment that a certain milk dehydration plant is immune from the general property taxes of

the State as being the exclusive property of the United States.

The complaint alleged that on May 1, 1945, and again on May 1, 1946, the customary form of real estate tax was assessed against the land and building, and a separate personal property tax was assessed against the equipment in the building. Both the real estate tax and the personal property tax embraced all interests in the property without distinction as to ownership and without qualification, and the property was assessed for its full value. Attached to the complaint and made a part thereof were copies of a certain contract, deed and bill of sale and lease made between the United States and the Dairy Company pursuant to the Lend-Lease Act (22 U. S. C. A. 411-419) and Appropriation Act of Congress (55 U. S. Stat. 53-55). Pursuant to these documents the plant was constructed by the Dairy Company and was sold and conveyed by the Company to the Government. In turn it was leased by the Government to the Dairy Company for a period of five years commencing April 1, 1945 with option of the lessee to renew the lease for a second five years.

Paragraph 12 of the lease provided that the lessee shall pay "all taxes assessed or other governmental charges that may be legally imposed upon or constitute a lien against the facility."

The complaint also alleged that continuously since April 1, 1945 up to the present date the plant has belonged to the Government and the lease is in full force and effect. The prayer for relief asked for judgment declaring the real estate tax and the personal property tax null and void and that the plant be declared exempt from both taxes so long as it is owned by the United States.

Defendants demurred to the complaint, both on jurisdictional grounds and on the ground that the complaint did not state a cause of action. The trial court sustained the de-

murrers solely on the substantive ground, and denied to plaintiff the right to amend its complaint. On March 12, 1948, the Supreme Court of Minnesota filed its decision affirming the order of the trial court sustaining the demurrers, and on March 18, 1948, judgment in accordance therewith was entered in said Supreme Court.

The Minnesota Supreme Court decided that as to the real estate tax, the remedy of Declaratory Judgment sought to be invoked by plaintiff was unavailable, but as to the personal property tax that remedy was available. The Court then determined the merits of the controversy as to the personal property tax. Without questioning that the property belonged to the United States, the Court held that the Dairy Company was not entitled to judgment, solely because of paragraph 12 in the lease, above quoted. The decision rests exclusively on the Court's construction of the meaning and effect of this covenant in the Government's lease. That is a construction of language in a lease made by the United States which results in a State tax on property owned by the United States.

The position of the Dairy Company was and is that under the Constitution and laws of the United States, the property in question cannot be taxed either to the Government or to its lessee so long as it is owned by the Government, unless and until Congress shall expressly consent to such taxation. That has not been done.

Question Presented

Does the clause (paragraph 12) in the lease endow the State with a power, otherwise unavailable, to lay and collect this tax upon the full interests of the United States in the property?

Basis of Jurisdiction

This suit involved two different taxes,—a real estate tax on the land and building and a personal property tax on the equipment in the building. The two taxes represented two distinct issues. Determination of both issues depended upon construction of one set of instruments which covered the plant as a unit, but nevertheless the two taxes each involved a separate controversy. Part 1 of the opinion dealt solely with procedural matters by which it was held by the Minnesota Court that this was a proper remedy to determine the controversy respecting the tax on the equipment. Part 2 of the opinion relates to the merits of that controversy. Being a separate issue upon which a final judgment has been rendered on the merits, review is sought by this Court of that judgment as it relates to the tax imposed on the equipment in the plant. As a result of the judgment nothing remains but the administrative processes of collecting that tax.

A review of such judgment is plainly within the jurisdiction of this Court, under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344), authorizing such review:

> "Where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States."

After briefly describing the various instruments by which the Government acquired ownership of the plant and leased it to the Dairy Company, the Minnesota Court then stated:

> "On the basis of these facts, the Dairy Company seeks to be relieved from any possible tax burden, not because of any immunity to which it is itself entitled, but because of the conceded immunity of its 'lessor.'"
>
> (Page 83 of printed record)

The "immunity" referred to by the Court is described in the next succeeding sentence of the opinion as being the sovereign immunity under the Federal Constitution. Whether this asserted immunity should be given effect as to the tax on the equipment was the single substantive issue determined by the Court. Denial of this assertion was based solely on the Court's construction of paragraph 12 of the lease.

In *United States* v. *Allegheny County*, 322 U. S. 174, which was an appeal from a decision of the Supreme Court of Pennsylvania, involving validity of an *ad valorem* state tax on property of the Government, this Court said:

> "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of Federal law not controlled by the law of any state."
> (Page 183)

In *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, this Court said:

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court."
> (Page 564)

This suit was instituted under the Uniform Declaratory Judgment Statute of Minnesota. That statute is similar to the statute which was involved in the case of *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace*, 288 U. S. 249. There a similar proceeding was brought to secure a judicial declaration that a state excise tax, levied on the storage of gasoline, was invalid under the Federal Constitution. An order sustaining a demurrer to the complaint was affirmed by the Tennessee Supreme Court. On the question of juris-

diction of this Court to review the judgment of the State appellate court, it was said by this Court, after reviewing the provisions of the Uniform Declaratory Judgment Statute:

> "That the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax, cannot be questioned."
>
> (Page 261)

> "The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies."
>
> (Page 264)

It was thereupon decided by this Court that the proceeding involved a definitive adjudication of disputed Constitutional rights, and had the essentials of an adversary proceeding involving an actual controversy, and was within the judicial power of this Court to review. The instant case has the same characteristics which were involved in the Tennessee case.

The issue which is sought to be reviewed by this Court has been finally determined by the judgment entered in the Minnesota Supreme Court. That judgment affirmed an order of the trial court sustaining general demurrers to the complaint, which order specifically denied to plaintiff a right to amend its complaint. (Page 70, Printed Record in State Supreme Court). Since this is true, the only thing that remains to be done upon remittitur of the case to the trial

court is the ministerial act of entering a judgment of dismissal.

> "When a demurrer to a complaint is sustained without leave to amend the defendant is entitled to a judgment of dismissal."
>
> *Deuel* v. *Hawke*, 2 Minn. 50, Gil. 37 Dunnell's Minnesota Digest, Section 7559.

This has been the long established practice in Minnesota. There have been no adjudications since 1858.

Such being the law of the State there can be no question as to finality of the judgment entered in the Minnesota Supreme Court, *Richfield Oil Corporation* v. *State Board*, 329 U. S. 69. The dismissal thus entered makes the tax on the equipment *res adjudicata*, and there is left only the collection of the tax by ministerial officers.

Reasons for Allowance of Writ

The Supreme Court of Minnesota has upheld the assessment and collection of a tax embracing the Government's interest in property upon a principle of law not in accord with the applicable decisions of this Court, and having a far-reaching effect throughout the country.

The equipment was listed on the tax rolls for its full value and embracing all interests in the property. The assessment was made to the lessee as if it were the owner. The effect of the judgment was to sustain this tax. The annual amount of the personal property tax is approximately $6,000.00.

The basis of the judgment is the Court's own peculiar construction of paragraph 12 of the lease, giving to this clause the effect of bestowing upon the State of Minnesota taxing powers which it would not otherwise have, as if it were a third party beneficiary to a contract made between

the United States as lessor and this lessee. The Court does not question but what the property belongs to the Government and that the tax embraces the Government's interests. However, it is considered by the Court that the lessee has made a promise to the Government to undertake the payment of all taxes which the State may choose to impose upon the property, and that such promise inures to the benefit of the State to lay and collect taxes on the property the same as if it were privately owned. The principle of law here enunciated would apply equally to the tax on the real estate. The Court said:

> "If it was contemplated that the interest of the government in the facility was to exempt the Dairy Company from all taxes, both real and personal, paragraph 12 would be meaningless."
>
> (Page 83 of printed record)

This means the Court will apply the same doctrine to the real estate tax when that matter is adjudicated.

This decision is founded upon two errors which can have serious national consequences. In the first place, it was never intended that this covenant was to be an undertaking to pay any unconstitutional tax that a State might choose to impose upon the property. This was a standard form of government lease drafted by the Government's lawyers for general use throughout the country as to lend-lease plants. Such plants are located in many states, all under the same form of lease. In Minnesota alone there are thirteen such plants.

In drafting this standard form of lease, the Government lawyers were aware of the fact that some states impose taxes on leasehold estates and if such taxes were not paid the lessee's interest in the property might be subject to sale. Since the right to possession of the property was not to be transferred to anyone else without the prior consent

of the Government (paragraphs 5 and 24 of the lease), the purpose of paragraph 12 was merely to give the Government some assurance that its lessee would not forfeit to a stranger its right of possession through default in the payment of such a leasehold tax. The paragraph was inserted simply out of abundance of caution. Also, the Government's lawyers had in mind the possibility that Congress might at any time consent to taxation of these properties, and then paragraph 12 would be effective to require the lessee to pay the tax consented to. So far Congress has remained silent respecting the taxation of these plants.

In Minnesota all property, both real and personal, is taxed on the basis of a valuation of the entire interests in the property as a unit. The Minnesota Court viewed this lease as if it were made solely with reference to that State, and since this is the only kind of tax in existence in that State, the Court concluded paragraph 12 is "meaningless" if it was not intended to apply to this tax. Such reasoning does violence to the plain intent of the contract, and overlooks the possibility of Congressional consent. If one State court is permitted so to misconstrue a Government contract, other State courts will be free to adopt like constructions of similar contracts in effect in their jurisdictions. Paragraph 12 is by its terms limited to legal taxes, and was not an undertaking by lessee to pay all demands of the State in the guise or appearance of a tax on the property.

The decision is founded on a second error of even more far-reaching consequences. It is the holding of this case that a state may acquire taxing powers beyond constitutional limitations merely because of the lessee's promises contained in a Government lease, as if it were within the power of a private citizen, or the Government's contracting officer, to confer such authority. Such authority can only be derived from action by Congress. A large amount of Government

property is in the hands of private persons in the various states under various forms of agreements. Such agreements generally include provisions to meet every conceivable contingency and commonly contain some statement as to taxes. If every clause about taxes used by a contracting officer can be made the basis for extension of a State's taxing powers over Government property, the principle of constitutional immunity will be seriously impaired.

Assignments of Error

The Court erred:

(1) In sustaining this tax.

(2) In holding in effect that the State of Minnesota, as a supposed beneficiary of the contract between the Dairy Company and the Government (paragraph 12 of the lease), may enforce this tax regardless of its validity or invalidity.

Argument

The opinion refers to a companion case, *Land O' Lakes Dairy Company* v. *County of Douglas,* which involved only real estate taxes on another plant owned by the Government and similarly leased and which was dismissed by the Minnesota Supreme Court on procedural grounds without determination of the merits. While as yet the validity of real estate tax has not been adjudicated, it is clear from the statements in this opinion that the same doctrine will be applied to that tax. The holding of the Court does not rest on any distinctive features of the personal property tax in contrast to the real estate tax.

Both forms of property, as a matter of general practice, are listed on the tax rolls and valued as a unit, with the personal property being entered in the name of the owner.

Regarding personal property taxes, Section 272.50, Minnesota Statutes, 1945, provides:

> "The taxes assessed upon personal property, with lawful penalties, interest, and costs, shall be a first and perpetual lien, superior and paramount to all other liens or encumbrances thereon, except the vendor's interest in conditional sales contracts, whether prior or subsequent in point of time, upon all of the personal property then owned by the person assessed, from and including May 1 in the year in which they are levied, until they are paid."

Payment of the personal property tax is enforced by a summary proceeding wherein a warrant is issued for distraint and sale of any personal property of the person assessed found in the county. Upon return of the warrant a personal judgment is entered for the unpaid amount of the tax against the person assessed, which judgment may be enforced by execution without the usual exemptions. (See Sections 277.02, 277.03 and 277.10, Minnesota Statutes, 1945.)

Only recently this Court reaffirmed the well established doctrine that in the absence of an express consent by Congress, a State may not tax the interest of the Government either to the Government itself or to the Government's contractor:

> "We think, however, that the Government's property interests are not taxable either to it or to its bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed

as we have held. But neither he nor the Government can be taxed for the Government's property interest."

United States v. *Allegheny County, supra,* pages 187, 188.

Likewise this Court has held that the Government's contractor may assert the immunity:

"Mesta as bailee is under a duty to protect the property and may protect itself from unlawful burdens put upon it because of its possession of the property."

United States v. *Allegheny County, supra,* page 192.

The foregoing principles established by this Court have been repudiated by the holding of this case. The tax which is here sustained is clearly an unconstitutional tax unless by Federal law and construction paragraph 12 of the lease gives the State the right to impose it and collect it. The Minnesota Court says it does. Such a proposition has not before been presented to this Court in any clear cut manner. In the case of *Mullen Benevolent Corporation* v. *United States,* 290 U. S. 89, the Government's contracting officer withheld, from the price of certain lands which the Government was purchasing, a sum sufficient to cover an expected reassessment for local improvements. It was claimed that this constituted an agreement to pay the reassessment, but this Court held that a purpose to pay only valid subsisting liens negatives an agreement to pay something which had no such character. In the *Allegheny County* case, *supra,* the contract contained provisions for reimbursement by the Government of any taxes the bailee was required to pay, but no one seriously contended that such a provision would have the effect of giving the State taxing powers not otherwise available to it.

This Court has repeatedly held that only Congress can waive the immunity; that the waiver must be affirmative; and that it must be clearly expressd.

United States v. *Allegheny County, supra;*
Mayo v. *United States,* 319 U. S. 441;
Oklahoma v. *Barnsdall Corporation,* 296 U. S. 521.

By its decision in this case the Minnesota Supreme Court has refused to give effect to these principles expressed by this Court, and has on the contrary adopted a rule in direct conflict therewith.

Respectfully submitted,

M. J. DOHERTY,
HAROLD JORDAN,
Attorneys for Petitioner.

DOHERTY, RUMBLE, BUTLER
& MITCHELL,
Saint Paul, Minnesota,
Of Counsel.

(6120)

FILE COPY

[redacted]

OCTOBER TERM, 1947

LAND O'LAKES DAIRY COMPANY,

Petitioner,

vs.

VILLAGE OF SEBEKA, et al.,

Respondents.

BRIEF IN OPPOSITION

GEO. B. SJOSELIUS
Deputy Attorney General
of Minnesota,
Attorney for Respondents.

Of Counsel:
J. A. A. BURNQUIST
Attorney General
of Minnesota

KENT G. VAN DER BERG
Assistant Attorney General

CHARLES W. KENNEDY
County Attorney,
Wadena County, Minnesota.

Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

SUBJECT INDEX

	Page
Question Presented	1
Statutes Involved	1
Statement of Facts	2
Summary of State Court's Opinion	3
Argument	5
I. No federal question is involved	6
II. Second action now pending raises federal question alleged to have been decided in the instant case	8
III. No final judgment on validity of tax presented for review	8
IV. No federal right to remedy of declaratory judgment	9
V. Assignments of error are inadequate	9
Conclusion	10

TABLE OF CASES

Bacon & Sons v. Martin, 302 U. S. 642	8
Crane v. Hahlo, 258 U. S. 142	9
Dohany v. Rogers, 281 U. S. 362	9
Enterprise Irrigation Dist., et al., v. Farmers Mutual Canal Co., 243 U. S. 157	6
Eustis v. Bolles, 150 U. S. 361	7
Grays Harbor Co. v. Coats-Fordney Co., 243 U. S. 251	8
Herb v. Pitcairn, 324 U. S. 117	8
Honeyman v. Hanan, 300 U. S. 14	7
Insurance Co. v. Treasurer, 11 Wall. 204	7
James v. Dravo Contracting Co., 302 U. S. 134	7
Leonard v. Vicksburg, etc., R. R. Co., 198 U. S. 416	6
Lynch v. New York, 293 U. S. 52	7
Murdock v. Memphis, 20 Wall. 590	7
State ex rel. Globe I. Co. v. District Court, 136 Minn. 147, 161 N. W. 391	9
State of Minn. v. National Tea Co., 309 U. S. 551	8
Swanson v. Great Northern Railway, 73 Minn. 103, 75 N. W. 1033	9

STATUTES CITED

Minnesota Statutes Annotated:	
Chapter 278	2, 5
Chapter 555	1, 2, 3, 5
Section 277.02	3, 8
Section 278.01	3, 5
Section 555.01	1, 6
Section 555.11	7

TEXTS AND LAW REVIEW ARTICLES

Borchard, Declaratory Judgments, 2nd Ed., Part II, Chapter V:	
Page 299	7
Page 305, note 62	6
Borchard, Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments, 26 Minn. Law Review 677	6

Supreme Court of the United States

No. 777

OCTOBER TERM, 1947

LAND O'LAKES DAIRY COMPANY,
Petitioner,

vs.

VILLAGE OF SEBEKA, et al.,
Respondents.

BRIEF IN OPPOSITION

QUESTION PRESENTED

May the courts of the State of Minnesota refuse to allow relief under a state declaratory judgments act on the ground that the petitioner is not entitled to relief under the terms of that act by reason of its own conduct?

STATUTES INVOLVED

Minnesota Statutes Annotated, c. 555. M. S. A., sec. 555.01, provides:

> "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal regulations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

THE FACTS

The facts as contended to be by the petitioner are substantially these. The petitioner constructed and equipped a plant at Sebeka, Minnesota. By virtue of a contract with the United States of America and by virtue of a certain warranty deed and bill of sale from it to the United States made pursuant to the contract, the United States is and has been since May 1, 1945, the sole and exclusive owner of the real and personal property here involved. The petitioner during all of said time has been in possession of all the real and personal property under a lease from the United States. (State Record ff. 5 to 20, inclusive.) On May 1, 1945, and again on May 1, 1946, the real and personal property was listed and assessed for tax purposes. Pursuant to the provisions of M. S. A., ch. 278, petitioner paid half of the real estate tax and simultaneously filed its petition as required by ch. 278. Pursuant to the mandate of ch. 278, these proceedings were dismissed for failure of petitioner to comply with ch. 278. The 1945 personal property taxes were paid in full. None of the real estate or personal property taxes assessed for the year 1946 have been paid. After dismissal of the proceedings under ch. 278, the petitioner brought this action pursuant to ch. 555 praying for judgment declaring the real and personal property exempt from taxation as of May 1, 1945, and all taxes thereon null and void and of no legal effect and for additional declarations. R. pp. 73 and 74. Respondents' demurrers to the complaint were sustained. R. p. 73. Petitioner appealed to the state supreme court from the order sustaining the demurrers.

SUMMARY OF THE STATE COURT'S OPINION

In Part I of its opinion the Minnesota Supreme Court considered whether a taxpayer could question the validity of a tax in an action for declaratory judgment under M. S. A., c. 555, in view of other remedies provided by M. S. A., secs. 277.02 and 278.01. The court held that sec. 278.01 provided an exclusive remedy for contesting real estate taxes and that, therefore, petitioner could not prevail as to the real estate taxes assessed. The court also held that M. S. A., sec. 277.02, providing a remedy for contesting personal property assessments, was so defective as a remedy that "* * * with respect to personal property taxes relief under the declaratory judgments act is available * * *." R. p. 80.

In Part II of the opinion the court turned its attention to the question as to whether, under the principles enunciated in Part I of its decision, petitioner can in an action for declaratory judgment raise the question of implied delegated immunity.

The court held "that while the declaratory judgments act is available for the purpose of testing the validity of a questioned tax levy and assessment as to the personal property" the petitioner is not entitled to relief under the terms of that act because of its own conduct in voluntarily assuming to pay the taxes. R. pp. 83, 84.

After the issuance of the court's first opinion on March 12, 1948, petitioner petitioned the Minnesota Supreme Court for the purpose of clarification of the last paragraph of the court's opinion. R. p. 102. The petitioner asserted that it was not clear whether the decision rested on a determination of the alleged tax immunity or whether it rested on the procedural matter of interpretation of the declaratory judgments statute. Petitioner complained of the possibility that the United States Supreme Court might refuse to grant certiorari on the

grounds that there was no federal question presented and that the District Court of Minnesota, before whom there is now pending an action to collect the personal property tax which is the subject of this action, might consider the Minnesota decision as res judicata and, therefore, refuse to determine the question of tax immunity on its merits. R. p. 104. For these reasons, petitioner requested that the court clarify its opinion. Thereafter the Minnesota Supreme Court modified the last paragraph of its first opinion in the manner indicated below. To set forth the language of the opinion before and after amendment, we have combined the language of the two opinions. The matter stricken is that which appeared in the first opinion and was stricken therefrom. The matter underlined is new matter added by the second decision.

> "It is our judgment therefore, that while the declaratory judgments act is available for the purpose of testing the validity of a questioned tax levy and assessment as to the personal property, the dairy company in this action is not entitled to relief under its terms. ~~Having voluntarily assumed to pay the tax, it is faced with this dilemma: (a) if it is not obligated to pay the tax, it has no such interest in the question as will entitle it to a declaratory judgment in its favor; (b) if it is obligated to pay the tax, it is so because of a duty voluntarily assumed, and~~ *Since the dairy company has voluntarily assumed to pay the tax* it is not entitled to a judgment declaring its own promise to have been a meaningless thing. For these reasons the order of the trial court sustaining the demurrer to the complaint is affirmed."

ARGUMENT

Before entering upon a discussion upon the merits of the issue before the court, we deem it appropriate to comment upon the efforts of the petitioner to enlarge the scope of the question. In its decision the Supreme Court of Minnesota made two final determinations and only two. It decided (1) "that, so far as the determination of tax matters referred to in § 278.01 on real estate is concerned, c. 278 provides the necessary requisites and that L. 1933, c. 286 (M. S. A., c. 555), known as the uniform declaratory judgments act, is not available to the dairy company as an alternate remedy" (R. p. 80), and (2) that under the facts alleged in the complaint, the dairy company is not entitled to relief under the terms of the uniform declaratory judgment because of its own conduct. R. pp. 83, 84.

Despite the fact that petitioner argues about the effect of the decision upon real estate taxes, the first determination of the state court as stated above is not an issue in the matter now pending before this court. On page 4 of its petition, petitioner states:

> "Being a separate issue upon which a final judgment has been rendered on the merits, review is sought by this Court of that judgment as it relates to *the tax imposed on the equipment in the plant.*" (Italics supplied.)

From this statement it is clear that no question is now before this court as to the real estate tax and that the only issue before the court involves the state court decision affecting the personal property tax.

I.

No Federal Question Is Involved.

Petitioner in its complaint prayed for a judgment "declaring and adjudging the land, plant, machinery, and equipment * * * to be exempt from taxation as of May 1, 1945; that all assessments, levies and taxes described in the complaint be declared wholly null and void and of no legal effect; that the property retain its status of exemption from taxation until such time as the United States should be divested of its interest in the property * * *." R. p. 74.

The court does not hold that the property in question is taxable. The court holds that while, generally, the validity of personal property taxes may be determined in an action brought under a state statute making available actions for declaratory judgment, in this case upon the specific facts here present including the voluntary assumption by the petitioner of the payment of the tax, the dairy company is not entitled to a judgment determining the validity of the tax.

In so holding the state court is merely applying the well-settled principles of the law of declaratory judgment. The granting of declaratory judgment is a matter within the discretion of the court. M. S. A., sec. 555.01.

> Borchard, Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments, 26 *Minn. Law Review* 677.

Courts have refused declaratory judgment in cases in which the plaintiff by his own conduct has weakened his claim for relief.

> Borchard, Declaratory Judgments, 2nd Ed., Part II, Chapter V, p. 305, note 62.
>
> Cf. *Enterprise Irrigation District, et al., v. Farmers Mutual Canal Co.*, 243 U. S. 157.
>
> Cf. *Leonard v. Vicksburg, etc., R. R. Co.*, 198 U. S. 416.

The Minnesota statute requires "all persons who have or claim any interest which would be affected by the declaration" to be made parties. M. S. A., sec. 555.11. Failure to include such persons as parties of itself warrants a refusal of relief by declaratory judgment.

Borchard, Declaratory Judgments, 2nd Ed., Part II, Chapter V, p. 299.

If, as contended by petitioner, the state seeks here to tax property belonging to the federal government, that the federal government is an interested party would seem obvious. In *James v. Dravo Contracting Co.*, 302 U. S. 134, the federal government denied the tax immunity alleged in its behalf. In *United States v. Allegheny County*, 322 U. S. 174, the federal government contended for immunity. It would, therefore, seem only reasonable that a state court would deny the use of declaratory judgment in absence of federal participation in the action.

Petitioner in its petition to the state court for rehearing and clarification of the first opinion put to the court the issue of whether the decision rested on a procedural matter of interpretation of the declaratory judgment statute. R. p. 104. The second opinion clearly resolves this issue in the affirmative and confirms petitioner's fears as to the meaning of the original opinion.

The petition should be denied on the ground that no federal question is presented.

Murdock v. Memphis, 20 Wall. 590;
Insurance Co. v. Treasurer, 11 Wall. 204;
Eustis v. Bolles, 150 U. S. 361;
Lynch v. New York, 293 U. S. 52;
Honeyman v. Hanan, 300 U. S. 14.

As the state court has clarified its first opinion for the purpose of resolving doubts as to the presence or absence of a federal question, request for further clarification would seem unnecessary.

Cf. *State of Minnesota v. National Tea Co.*, 309 U. S. 551;

Cf. *Herb v. Pitcairn*, 324 U. S. 117, 125.

II.

Second Action Now Pending Raises Federal Question Alleged to Have Been Decided in the Instant Case.

The decision of the district court in the instant case was rendered on May 16, 1947. On April 5, 1948, an action was commenced against petitioner to collect the taxes involved in the instant case. M. S. A., sec. 277.02. Petitioner has interposed an answer in the second action. R. p. 104.

Although the instant case finally disposes of the issue of whether relief may be obtained by way of declaratory judgment, it is not a final determination of any federal question.

The reasoning applied in the condemnation cases should apply in the instant case.

Grays Harbor Co. v. Coats-Fordney Co., 243 U. S. 251.

III.

No Final Judgment on Validity of Tax Presented for Review.

The judgment rendered by the state court is not a declaratory judgment sustaining a tax or determining the question sought to be reviewed here.

The state court refused to enter a judgment declaring whether Clause 12 of the lease endows "the state with a power * * * to collect the tax upon the full interests of the United States in the property." Petition for writ of certiorari, page 3.

Bacon & Sons v. Martin, 302 U. S. 642 (268 Ky. 612, 105 S. W. 569).

The most petitioner can obtain is a judgment of dismissal. Such a judgment of dismissal under the facts of this case is not a final determination on the merits nor does it operate as a bar or estoppel.

Swanson v. Great Northern Ry., 73 Minn. 103, 75 N. W. 1033;

State ex rel. Globe I. Co. v. District Court, 136 Minn. 147, 161 N. W. 391.

IV.

No Federal Right to Remedy of Declaratory Judgment.

The right of petitioner to determine the validity of the personal property tax by an action in declaratory judgment is a purely state right conferred by a state statute. The determination that petitioner is not entitled to relief under the terms of that statute by reason of its own conduct in voluntarily assuming to pay the tax and seeking to evade that responsibility by use of state procedure, namely, an action for a declaratory judgment is purely a state question. There is no federal law which guarantees to petitioner the remedy of an action in declaratory judgment.

Dohany v. Rogers, et al., 281 U. S. 362, 369;

Crane v. Hahlo, et al., 258 U. S. 142, 147.

V.

Assignments of Error Are Inadequate.

Petitioner's assignments of error are so broad and indefinite as not to comply with rule 27 and rule 38. The decision of the state court does not sustain the tax in question. The decision does hold that the State of Minnesota is a third party beneficiary of a contract between petitioner and the federal government.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied.

GEO. B. SJOSELIUS
Deputy Attorney General
of Minnesota
Attorney for Respondents.

Of Counsel:

J. A. A. BURNQUIST
Attorney General
of Minnesota

KENT C. VAN DEN BERG
Assistant Attorney General

CHARLES W. KENNEDY
County Attorney,
Wadena County, Minnesota.